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U.S. DEPT. OF JUSTICE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 36 33

MURRAY WINTERS,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee

**APPEAL FROM THE COURT OF SPECIAL SESSIONS OF THE CITY OF
NEW YORK, STATE OF NEW YORK**

MOTION TO DISMISS OR AFFIRM

FRANK S. HOGAN,

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New York County.

INDEX

SUBJECT INDEX

	Page
Motion to dismiss or affirm	1
Statement of the case	1
Summary of facts	2
New York statute involved	2
Questions presented	3
Opinions below	3
The statute is specific and definite and as applied to the activity of the appellant is a reasonable and proper exercise of the State's police power	4
Conclusion	10

TABLE OF CASES CITED

<i>Baender v. Barnett</i> , 255 U. S. 224	8
<i>Banks, In re</i> , 56 Kans. 242, 42 P. 693	5
<i>Chaplinsky v. New Hampshire</i> , 315 U. S. 568	4, 9
<i>Commonwealth v. Herald Pub. Co.</i> , 128 Ky. 424, 108 S. W. 892	5
<i>Connally v. General Construction Co.</i> , 269 U. S. 385	6
<i>Coomer v. U. S.</i> , 213 Fed. 1	5, 6
<i>Crooks v. Harrelson</i> , 282 U. S. 55	6
<i>Fox v. Washington</i> , 236 U. S. 273	6, 8
<i>Foy Prod. Ltd. v. Graves</i> , 278 N. Y. 498	5
<i>Gilbert v. Minnesota</i> , 254 U. S. 325	9
<i>Gitlow v. People of New York</i> , 268 U. S. 652	9
<i>Halsey v. New York Society for Suppression of Vice</i> , 234 N. Y. 1	7
<i>Jennings v. State</i> , 16 Ind. 335	7
<i>Kay v. U. S.</i> , 303 U. S. 1	6
<i>Knowles v. U. S.</i> , 170 Fed. 409	9
<i>McJunkins v. State</i> , 10 Ind. 140	7
<i>Magon v. U. S.</i> , 248 Fed. 201, 249 U. S. 618	5
<i>Nash v. U. S.</i> , 229 U. S. 373	6
<i>Near v. Minnesota</i> , 283 U. S. 697	9
<i>People v. Berg</i> , 241 App. Div. 543	5

	Page
<i>People v. Doris</i> , 14 App. Div. 117	5
<i>People v. Eastman</i> , 188 N. Y. 458	7
<i>People v. Muller</i> , 96 N. Y. 408	5, 7
<i>People v. Seltzer</i> , 122 Misc. 329	5
<i>Redhun v. Cahill</i> , 31 Fed. Supp. 47	9
<i>Robinson v. U. S.</i> , 65 S. Ct. 666	6
<i>Rosen v. U. S.</i> , 161 U. S. 29	5
<i>Schaeffer v. U. S.</i> , 251 U. S. 466	9
<i>Southland Gasoline Co. v. Bailey</i> , 319 U. S. 44	4, 5
<i>State v. McKee</i> , 73 Conn. 18, 46 Atl. 409	5
<i>State v. Pioneer Press Co.</i> , 100 Minn. 173, 110 N. W. 867	5
<i>State v. Van Wye</i> , 136 Mo. 227, 37 S. W. 938	5
<i>Strömberg v. California</i> , 283 U. S. 359	6
<i>Tyomies Pub. Co. v. U. S.</i> , 211 Fed. 385	5, 9
<i>U. S. v. American Trucking Assn.</i> , 310 U. S. 534	5
<i>U. S. v. Gaskin</i> , 64 S. Ct. 318	6
<i>U. S. v. Kirby</i> , 74 U. S. 482	8
<i>U. S. v. Ragen</i> , 314 U. S. 513	6
<i>U. S. v. Rebhun</i> , 109 Fed. (2d) 512, 310 U. S. 629	5
<i>U. S. v. Rosen</i> , 161 U. S. 29	5
<i>Williams v. State</i> , 138 Minn. 827	5
<i>Winters v. People of the State of New York</i> , 268 App. Div. 30, 294 N. Y. 545	4

STATUTES CITED

Constitution of the United States, 14th Amendment	3
Penal Law of the State of New York, Article 106:	
Section 1140	7
Section 1140-a	7
Section 1140-b	7
Section 1141	7
Section 1141-a	7
Section 1142	7
Section 1142-a	7
Section 1143	7
Section 1145	7
Section 1146	7
Section 1148	7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 636

MURRAY WINTERS,

Defendant-Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee

MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Now comes the appellee in the above-entitled cause, by their counsel of record, and moves that the appeal be dismissed, or in the alternative that the final judgment appealed from be affirmed.

Statement of the Case

The defendant-appellant was convicted in the Court of Special Sessions of the City of New York, on January 27, 1943, of the crime of POSSESSING WITH INTENT TO SELL MAGAZINES MADE UP OF ACCOUNTS OF DEEDS OF BLOODSHED, LUST OR CRIME (Penal Law, § 1141, subd. 2). The appellant was sentenced to pay a fine of \$100 or to be imprisoned for 30 days. The appellant paid the fine and appealed to the

Appellate Division, First Department, which unanimously affirmed the judgment on May 19, 1944. On July 19, 1945, the Court of Appeals affirmed the conviction, Chief Judge Lehman dissenting. This appeal was allowed on September 10, 1945 by Chief Judge Lehman.

Summary of Facts

The defendant, a book dealer, was found in possession of a large number of magazines the contents of which were stories of criminal deeds of bloodshed, lust and crime embellished with pictures of fiendish and gruesome crimes, and lurid photographs of victims and perpetrators thereof. Featured articles bore such titles as "Bargains in Bodies," "Girl Slave to a Love Cult," and "Girls Reformatory." None of the contributors were suggested to be distinguished by their place in the literary world nor by the quality of their style. The magazines were found tied up in small bundles suitable for delivery to distributors, and there was proof of an admission by the defendant of his readiness to sell single copies indiscriminately.

New York Statute Involved

Section 114f, subdivision 2, of the Penal Law, provides, so far as pertinent, that any person who

"Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; . . .

"In guilty of a misdemeanor . . ."

Questions Presented

The appellant claims that the statute is repugnant to the Fourteenth Amendment of the Constitution of the United States, in that

1. it is vague and indefinite and
2. it abridges the freedom of the press.

The present motion by the appellee to dismiss, or in the alternative to affirm, is predicated upon the ground that these alleged constitutional questions are so unsubstantial as to be devoid of merit, to require no further argument, and to be specifically foreclosed by the decisions of this Court.

Opinions Below

In considering the constitutionality of this statute, the Appellate Division held that it

“aimed exclusively at printed matter which presents tales of bloodshed, crime or lust in a manner that would have a tendency to demoralize its readers and would be likely to corrupt the morals of the young and lead them to immoral acts” (268 App. Div. 30, 32),

and concluded that, as so construed,

“the statute challenged is valid, that its enactment is a legitimate exercise of the police power of the State
• • •” (268 App. Div. at p. 34).

The Court of Appeals agreed with the Appellate Division as to the evils which the Legislature had sought to avoid in enacting the statute and found as a fact that the magazines which the appellant had in his possession fell within its ban. The Court overruled the appellant's claim that the criterion of indecency set forth in the statute was so vague and indefinite as to be unconstitutional, remarking that

"a question as to whether a particular publication is indecent or obscene * * * is a question of the times which must be determined as a fact * * *" (294 N. Y. 545, 551).

Finally, the Court held that the facts of the present case brought it squarely within the limits of the State's police power as outlined by this Court in *Chaplinsky v. New Hampshire* (1941), 315 U. S. 568, 572, since the appellant's publications

"are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (294 N. Y. at p. 553).

I

The Statute Is Specific and Definite and as Applied to the Activity of the Appellant Is a Reasonable and Proper Exercise of the State's Police Power.

A. *The Statute is Specific and Definite*

The statute in question (Penal Law, § 1141, subd. 2) uses words of common and clear import to define the conduct penalized. There is nothing complex or abstruse either in the words or in the grammar employed. So far as it relates to the instant case, the law provides simply and clearly that any person who

"has in his possession with intent to sell * * * any * * * magazine devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust or crime"

is guilty of a misdemeanor.

Reading this subdivision together with the general subject matter of which it is a part [*Southland Gasoline Co. v.*

Bailey (1943), 319 U. S. 44, 47], in order to arrive at the legislative purpose which prompted the enactment of the statute [*United States v. American Trucking Ass'n* (1939), 310 U. S. 534, 542-4], it becomes clear that the evil, which the statute sought to prevent, was the distribution of such publications as are "calculated to induce especially among the young, the immoralities they are thus incited to dwell upon, and so to endanger the public morals" [*State v. McKee* (1900), 73 Conn. 18, 26, 46 Atl. 409, 412].

The type of publication which is likely to bring about such a result has been so frequently considered by the courts as to supply an ascertainable standard of conduct. [See *Rosen v. United States* (1895), 161 U. S. 29, 43; *Magon v. United States* (1918), 248 Fed. 201, certiorari denied 249 U. S. 618; *Foy Prod. Ltd. v. Graves* (1938), 278 N. Y. 498; *People v. Muller* (1884), 96 N. Y. 408, 411; *People v. Berg* (2d Dept. 1934), 241 App. Div. 543, 544-5; *People v. Doris* (1st Dept. 1897), 14 App. Div. 117, 119; *People v. Seltzer* (Sup. Ct. N. Y. Co. 1924), 122 Misc. 329, 333, 335; *State v. McKee* (1900), 73 Conn. 18, 26, 46 Atl. 409, 412; *State v. Pioneer Press Co.* (1907), 100 Minn. 173, 110 N. W. 867, 868; *Williams v. State* (1923), 138 Minn. 827; *In re Banks* (1895), 56 Kans. 242, 42 Pac. 693, 694; *State v. Van Wye* (1896), 136 Mo. 227, 37 S. W. 938, 941; *Commonwealth v. Herald Pub. Co.* (1908), 128 Ky. 424, 108 S. W. 892, 895.]

It has long been established that a standard which can be no more precisely tested than by the experience of the community as to what the preservation of its morality requires is constitutionally valid. [*United States v. Rosen*, *supra*, 161 U. S. 29, 43; *United States v. Rebhun* (1940), 109 Fed. (2d) 512, 514, certiorari denied 310 U. S. 629; *Tyomies Pub. Co. v. United States* (1914), 211 Fed. 385, 388; *Coomer v. United States* (1914), 213 Fed. 1, 5; *Magon v. United States* (1918), 248 Fed. 201, certiorari denied 249 U. S. 618.]

Although there may be involved in the determination of criminality an element of degree as to which estimates may differ [see *Nash v. United States* (1913), 229 U. S. 373, 376-7], still, if the conduct penalized is "not beyond the ready comprehension either of persons affected by the act or of [those] called upon to determine violations" [*United States v. Ragen* (1942), 314 U. S. 513, 524], a statute will be held to be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." [See *Kay v. United States* (1938), 303 U. S. 1, 9; *Connally v. General Construction Co.* (1926), 269 U. S. 385, 391.]

Appellant's suggestion, that the statute is so vague that treatises on crime, criminal law case books and mystery stories might conceivably fall within the purview of the statutory prohibition, proposes a conception too absurd to be considered as within the legislative intent. [See *Crooks v. Harrelson* (1930), 282 U. S. 55, 60,] The rule that defendants are not to be convicted under statutes too vague to apprise the citizen of the nature of his crime does not require distortion or nullification of the evident meaning and purpose of the legislation. [*United States v. Gaskin* (1944), 64 Sup. Ct. 318, 319.] Nor is such a possibility a corollary of the judgment convicting this defendant. If the statute be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness. [*Fox v. Washington* (1915), 236 U. S. 273, 277; see also *Robinson v. United States* (1945), — U. S. —, 65 S. Ct. 666, 668-9.]

The dissent of Chief Judge Lehman in the court below cites *Stromberg v. California* (1930), 283 U. S. 358 as authority for the proposition that the statute as construed by the New York Court of Appeals is so vague and indefinite as to permit punishment of the fair use of freedom of

speech. That case involved a prosecution under a statutory clause which was not only patently vague and was so recognized by the trial court, but which was furthermore highly susceptible of a construction which would strike at the very right of the people through the free exchange of ideas to secure a government representative of the will of the governed. The power of the community to protect itself from practices that are corrupting and dangerous to its morals was not involved.

The Indiana cases cited by Chief Judge Lehman rested on a requirement of Indiana law that crimes be defined and punishment therefor fixed by statute and not otherwise. [*Jennings v. State* (1861) 16 Ind. 335; *McJunkins v. State* (1858), 10 Ind. 140]. For that reason, the Indiana Court refused to sustain convictions for offenses never before held to be included within the definition of "public indecency" under a statute which merely prohibited "notorious lewdness or other public indecency," but which failed to enumerate the elements or acts which constituted the offense. The Legislature of the State of New York has in this case enumerated the elements and acts which constitute the crime of "Indecency" with great particularity [see New York Penal Law, Article 106; §§ 1140, 1140-a, 1140-b, 1141, 1141-a, 1142, 1142-a, 1143, 1145, 1146, 1148].

The statute in the case at bar presents no such difficulty. Section 1141 subdivision 1 deals with publications which have a tendency to corrupt the morals of the community by inciting to sexual misbehavior. [*People v. Eastman* (1907), 188 N. Y. 458; *Halsey v. New York Society for Suppression of Vice* (1922), 234 N. Y. 1; *People v. Muller* (1884), 96 N. Y. 405.] Reading subdivision 2 in the light of subdivision 1 as required by the canons of construction, the Court below (294 N. Y. at p. 550) recognized that it too seeks to protect the morals of the community by barring such pub-

lications as may "become vehicles for inciting violent and depraved crimes against the person."

B. *The Statute as Applied to the Appellant's Conduct Is Clearly Within the Police Power of the State*

At the outset, it may be observed that unless the statute is unconstitutional on its face, the petitioner is confined to attacking its validity *as applied to his activities as disclosed by the record*. He is not entitled to the benefit of any fanciful construction which might conceivably render the statute invalid. [*Fox v. Washington* (1915), 236 U. S. 273, 277; *Baender v. Barnett* (1921), 255 U. S. 224, 225-226; *United States v. Kirby* (1868), 74 U. S. 482, 486.] As was observed in *Fox v. Washington*, *supra*, 236 U. S. 273, 277:

"So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions, they should be so construed; . . . and it is to be presumed that state laws will be construed in that way by the state courts."

Under the rule thus enunciated, there can be no conceivable doubt of the validity of the statute. As appears from the summary of facts (*supra*, p. 2), the publications in appellant's possession were clearly composed of "pictures and stories of deeds of bloodshed, lust or crime" which, to quote the court below (294 N. Y. at p. 551):

"plainly carried an appeal to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake."

Since, as we have shown, subdivision 2 of Section 1141 of the New York Penal Law aims exclusively at printed matter which presents stories of crime in a manner calculated to impair public morals and to induce crime, its validity is unquestionable. The constitutional guarantee of

freedom of the press provides no immunity from punishment to those who publish matter inimical to the public welfare and dangerous to public morals.

See *Near v. Minnesota* (1931), 283 U. S. 697, 714;

Gitlow v. People of New York (1924), 268 U. S. 652, 666-7;

Gilbert v. Minnesota (1920), 254 U. S. 325, 332;

Schaeffer v. United States (1920), 251 U. S. 466, 474;

Rebhun v. Cahill (1939), 31 Fed. Sup. 47, 49;

Tyomies Publishing Co. v. United States (1914), 211 Fed. 385;

Knowles v. United States (1903), 170 Fed. 409, 411-12.

Thus, this Court said in the *Gitlow* case, *supra*, 268 U. S. at pp. 666-667:

“That a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question.”

And again in *Chaplinsky v. New Hampshire* (1941), 315 U. S. 568, 571-572:

“Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise a constitutional problem. These include the lewd and obscene, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them

is clearly outweighed by the social interest in order and morality."

The Court below held that the matter contained in the magazines which the appellant sought to sell falls squarely within the zone of permissible state action, as outlined in the foregoing decisions of this Court. This ruling, we submit, should not be disturbed.

Conclusion

It is apparent, therefore, that the Federal question which the appellant seeks to bring to the consideration of this Court is wholly unsubstantial and one which has already been foreclosed by the previous decisions of this Court. The appellee, consequently, respectfully requests that the appeal be dismissed or, in the alternative, that the judgment appealed from be affirmed.

Respectfully submitted,

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